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No. 85-1947

In the

SUPREME COURT OF THE UNITED STATES
October Term, 1985

WILLIAM I. KAUFMAN

Petitioner,

v.

McCRORY STORES DIVISION OF McCRORY CORP. (N.Y.) sub. of RAPID AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER & LORIA REPORTING SERVICE, INC. (Penna.);

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI BY PETITIONER WILLIAM I. KAUFMAN

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EDITOR'S NOTE

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ARGUMENT IN REPLY TO RESPONDENTS

A. THE ISSUES RAISED IN THE PETITION ARE OF GREAT IMPORTANCE TO ALL THE PEOPLE OF THE UNITED STATES AND THEREFORE WARRANT SUPREME COURT REVIEW

In the Respondents' answers to the Petitioner's Reasons for Granting the Writ of Certiorari, they seem to skirt and avoid the main issue of what the Petition is all about. That issue is the preservation of

democracy through a Court System that offers no sanctuary to persons who would attempt to avoid and alter the truth in an ancillary court proceeding. The respondents' answers would seem to advance the mistaken theory that liberty and justice can survive over the years in the face of tainted and manipulated evidence and that their methods of participating in and conducting court ordered depositions should be allowed to survive unchallenged by this court and with no penalty what so ever for their alleged illegal acts. Their answers say in essence that Procedural Due Process, as guaranteed by the 5th and 14th Amendments to the Constitution, is to be followed where it suits their needs and avoided where it does not.

Contrary to what they would advance, a favorable decision on this Writ, and the case of Kaufman v. McCrory would ultimately effect, for the good of the country every law firm, every deponent,

every court and every civil action. It would offer a Federal remedy through 42 U.S.C. 1983 to those who are hurt intentionally by persons seeking to protect their private interests by having a Notary-Reporter alter and change depositions in their favor. In a time when approximately 90% of all Civil cases are settled out of court and when thousands of cases are placed in Arbitration proceedings each year both in the Federal and the State Court Systems, the taking of depositions has almost become the trial for most participants in civil suits. Depositions in reality have now become the main means for extracting the truth, for the vast majority of civil litigants. If testimony of witnesses is arranged for in advance as has happened in this case on June 27, 1983 and protection is offered to those witnesses where their untruthful testimony is challenged, by simply having their false statements changed by a willing Court

Reporter and the Reporting Service she is employed by, then under the climate of today's heavy reliance on depositions, a case can be manipulated to achieve a desired result.

This is not the fair trial process as guaranteed by the 5th and 14th Amendments but a type of trial process more closely related to the complete lack of Due Process after 1933 during the evil regime of Adolph Hitler. Then property was regularly taken away from its rightful owners on the basis of false evidence and perjured testimony. Yet, the German people at the time had the Weimar Constitution, a document that had many similar provisions to the United States Constitution. The Encyclopedia American Annual of 1933 from the Library of Congress lists some of these as follows: (pg. 346).

> "The commonwealth is a republic and the power of the state is derived from the people: all Germans are equal before the law. Men and women have fundementally the same civil rights and duties: and further "religious freedom, freedom of speech and the press are guaranteed"

Yet within one year, Amer. Annual of 1934, 270 reported: from the section, Constitution,

> "The colapse of popular government in 1933 has made uncertain the future of this document. At the close of 1933, the constitution was practically a dead letter"

The breakdown of law and order in Germany at the time and the complete lack of procedural due process led directly to the deaths of approximately 35,000,000 people throughout the world. Democracy can not long exist side by side with manipulated lawsuits and tampered evidence.

From the book, The Great Rights, 52, Pa. State Library comes this statement from the Section written by the Honorable and respected late Mr. Justice Hugo L. Black:

> "Most of these Fifth Amendment prohibitions are both definite and unequivocal. There has been much controversy about the meaning of "Due process of law" Whatever its meaning however, there can be no doubt that it must be granted. Moreover few doubt that it has an historical meaning which denies Government the right to take away life, liberty or property without trials properly conducted according to the Constitution and laws validly made in accordance with it."

To insure that Due Process is upheld, Notary Reporters and the parties that conspire with them in misconduct should come under 42 U.S.C. 1983 and should receive no immunity for their illegal acts. There are principals at stake here that are basic to the United States constitution and should be reviewed by this Honorable Court. The taking of depositions should be strengthened rather than weakened as the District Court's decision has surely done.

The respondents in their briefs imply that the petitioner did not do all he could in trying to cure the defective and changed depositions within the state court system. That is hardly true since Kaufman acting Pro. Se. made a strong effort in open court on Oct. 24, 1983 before State Judges, the Hon. Narrick and Staisey to have the cutoff date for Discovery reopenned. But that court held firm to the standing order of court that the discovery period had ended on Sept. 7, 1983. This was affirmed in a

written order by the two judges on Nov. 2, 1983 stating that Discovery was closed. But even if Discovery had been allowed to continue to help cure the defects and gain the truth, this did not absolve the respondents of their responsibility or liability for trying to destroy the petitioner's constitutional rights. When a person commits an illegal act, such as bank embezzlement and he later makes restitution to the damaged parties, he has still committed the crime and must be held accountable for what he has done. In no way could the alleged conspiracy to change the depositions and cover the truth been erased or made proper by the State court. It might have aided the petitioner in his right to a fair trial but the illegality was still there. A 1983 action was still open to be pursued in an alleged conspiracy between private parties and a duly appointed state officer.

Further, this court has long held that a person does not have to seek a long

arduous road through the state courts to gain a Federal remedy. The case of Monroe v.Pape. 81 S.Ct.,473 (1961) states as follows:

> "Under statute making every person who, under color of any state statute, ordinance, regulation, etc. deprives any citizen of the United States of his constitutional rights liable to party injured, federal remedy is supplementary to the state, and state remedy, if any, need not be first sought and refused before federal one is involved. 42 U.S.C.A. 1983."

This protection for the rights of all Americans has been stated by this court not because the various states cannot handle guaranteed rights in their own systems but because this court has recognized that sometimes the state laws might not be enforced to guarantee constitutional rights. Monroe v. Pape also states as follows:

> "One reason for passage of federal statute providing that every person who, under color of any state statute ordinance, custom, etc. deprives any citizen of the United States of his constitutional rights is liable to party injured was to afford a federal

> right in federal courts where because of passion, prejudice, neglect, intollerance or otherwise, state laws might not be enforced and claim of citizen to enjoyment of rights, privileges and immunity guaranteed by Fourteenth Amendment might be denied by state agencies. 42 U.S.C.A. 1983."

Other cases that have held that an injured party may seek Federal action outside the state government are: McNeese Jr. v. Board of Education for Community Unit School District 187, Cahokia, Illinois, et all. 83 S. Ct. 1433 (1963), Patsy v. Florida Board of Regents. 457 U.S. 496 (1982) and Mitchum v. Foster 92 S. Ct. 2151 (1972). Clearly this court haS spoken on the rights of injured persons to seek a Federal solution and respondents' efforts should not be accepted on a total state answer to a serious constitutional problem; the right to a Fair Trial and the right to full Due Process. Innocent parties should be prctected by this Court from unlawful tampering with their law suits in the Penna. State Courts.

B. THE ACTS OF A NOTARY PUBLIC WHO IS PERFORMING OFFICIAL DUTIES AS AN EXAMINER AT A STATE COURT DEPOSITION AND UNDER PENNA. STATUTE MUST BE ATTRIBUTABLE TO THE STATE AND UNDER COLOR OF STATE LAW.

Both the District Court in its opinion and the respondents in their reply briefs try to avoid Federal intervention under 42 U.S.C. #1983 by making a simple assertion that Bowes was acting merely as a regular stenographer between the time she gave the oath to the depondents and the time she put her signature on the depositions in a non legal certification with no seal or no commission ending date. No proof is offered for their assertions since none can be found in any statute, any reference material or in any previous cases. The only proof they offer is that Bowes was somehow acting like the lawyer in Polk County v. Dodson 454 U.S. 312 (1981). Surely after almost 200 years since the constitution was first written in 1787, there should have been at least one case that could have been used to back up their contentions. Polk County does not

even mention Notaries, Court Reporters or stenographers. Beside the poor logic of their argument, their attempts to relate this case to Polk County should fail because of a clear lack of legal precedence and an overwhelming amount of proof as offered in the Petition for the real view of the situation; that she was acting completely under the Penna. Notary Public Act of 1953 and the Penna. Rules of Civil Procedure, and indirectly under the U.S. Constitution, 5th and 14th Amendments.

Based on this decision on Kaufman v. McCrory, a party in a deposition would have to bring two people to a deposition in order to establish legal responsibility under the law. One would have to be the Notary Public to give the oath and act as the examiner and the other would have to be a stenographer. To do anything else under the District Court decision would create a situation where there would be no official examiner and no potential liability under 42 U.S.C. #1983. Obviously

this would be a foolish extra expense to an already expensive procedure and would depart completely from the custom throughout the U.S. of using court reporters who embody both the functions of a Notary Public and the functions of a stenographer. Yet to follow the normal course as in this case based on the District Court decision there would have been no official control over the depositions by a duly appointed state officer between June 28, 1983 when the depositions were taken and July 19, 1983 when they were finished and signed for without proper certification. This is a long period to leave uncompleted evidence with no state supervision. Anything could happen and did.

Beside the already extensively inrumerated duties and responsibilities of a Notary Public-Reporter, Examiner at a state court depcsition comes this further proof that a stenographer, acting in an official capacity can be held liable under 42 U.S.C. #1983. The case of Washington v.

Official Court Stenographer, U.S. D.C. E.D. Pa., 251 F. Supp., 945 (1966) says as follows:

> "Civil rights statute allowed action by indigent prisoner against court stenographer for alleged failure of latter to obey two court orders relating to furnishing of transcript to be brought in federal court, state remedies notwithstanding, and doctrine of exhastion of state remedies was inapposite. 42 U.S.C.A. # 1983."

This decision states in effect that a stenographer engaged in official duties can be held liable under a #1983 action when she acts with negligence or intentional miscounduct during, preceding or after a court trial. There are many similarities in this Washington case to the Kaufman v. McCrory case. Both stenographers were doing official court duties, the one was acting as a Notary-examiner during officially ordered court depositions, the other was employed by the court in official duties. Both were to have given properly finished transcripts to private parties under court orders and state law. Neither compiled. Bowes submitted changed and altered

depositions and the Court Stenographer submitted no trarscripts at all. Bowes, the Notary Public acting as a stenographer in official duties as an examiner should be held equally liable to 42 U.S.C. #1983, the same as the Court Stenographer was in Washington. Bowes should receive no immunity for the necessary stenographic part of her role as an official examiner. The writers of the Civil Rights Act of 1871 never meant for immunity to be so broad that some state actors could escape liability on sheer technical grounds that go beyond logic. She should not escape liability for alleged misconduct just because some of her official duties as a Notary-Reporter-Examiner required stenographic work to be performed.

From Federal Procedure, Lawyers Edition, Book 10, Chapter 26, comes this:

> "26:121 Recording and Transcribing Testimony - The officer before whom the deposition is to be taken must personally or by someone acting under his direction and in his presence record the testimony of the witness. The testimony must be taken stenographically or recorded by other

means ordered in accordance with FRCP 30 (b) (4) which is discussed below"

The Penna. Law Encyclopedia, DEPOSITIONS, Sec. #15, pg. 116, says essentially the same thing concerning the State of Pennsylvania. There is no mention of taking anything down but the complete testimony of the witness fully and whatever he said, whether he lied or not.

Yet when the transcripts were finished they contained significant changes from what was spoken. The place in the Agnew transcript where the April 5, 1983 meeting was supposed to be was changed completely as illustrated in the following conversation (paraphrased) that took place in the first 15 to 20 minute recess that was completely blocked out:

> SULLIVAN TO KAUFMAN: What else do you want me to ask him after the recess?
>
> KAUFMAN TO SULLIVAN: You didn't ask him any questions about the April 5th meeting, so far. (Referring at the same time to notes of suggested questions, June 22, 1983 Ex. #19 attached to Complaint)
>
> SULLIVAN: All right, I'll ask him questions about that meeting when we start again.

When the depositions were completed, the April 5, 1983 meeting was mixed in with questions of the first meeting of June 19, 1983. Fair Justice now and in the future requires that this entire situation be opened and the respondents made to answer for what they have done. America deserves respect for the law.

C. THE ALLEGED CONSPIRACY BETWEEN THE PRIVATE PERSONS AND A PUBLIC OFFICER COMES UNDER COLOR OF STATE LAW AND UNDER 42 U.S.C. 1983.

As the case of Krueger v. Miller, 489 F. Supp., 321 (E.D. Tenn. 1978) aff'd 617 F, 2d, 603 (6th Cir. 1980) clearly shows, a Notary Public acting in misconduct can be held liable under #1983. Misconduct on the part of public officials and the private persons who would conspire with them covers a myriad of wrongs but the essential idea is that they must be held accountable under the law of 1871. The possibility for penalty must be clear to all state officials who misuse their authority and to the parties who conspire with them.

This court has held and stated in many cases that persons acting in conspiracy with public officials can be liable under §1983. Respondent Superior cannot apply where the conspiracy is so broad and where persons throughout an organization have set a climate for wrongdoing. The case of Monell et. al. v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) is illustrative of this point as follows: (pg. 694)

> "Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see supra, at 600-602 we must reverse the judgement below."

When the officials of McCrory Corp. and Rapid American Corp. made it clear policy to the Buyer, Agnew and the Merchandise Manager, Boukis, that they must deal direct under many instances in order to save the

companys' money on their vendor purchases, they also implied and directed such policy must be held to, at all costs, even to the extent of allegedly perjured testimony, in official court papers. This policy was actively carried out in the meeting between Agnew, Boukis, company lawyers, Osterman, Berger and possibly other McCrory official on June 27, 1983 to ascertain what Agnew and Boukis should say at the next day's depositions in line with company policy on purchases. Likewise, the policy followed by Bowes, in changing and altering depositions and withholding proper certification was in line with the overall policy of Geiger and Loria as set by her mother, Virginia Loria, owner and President. All the pertinent details of this overall conspiracy by all persons involved cannot be fully documented until Discovery is undertaken and a trial is under way. Yet the overall framework of the total conspiracy indicates a far deeper involvement by Rapid, McCrory and Geiger &

Loria than mere acts of 3 people Agnew, Boukis and Bowes as the Respondents would tend to indicate. The theory of respondent superior cannot apply in this case nor was it intended to apply. Re: Turpin v. Mailet, et. al. 619 F. 2d 196 (1980).

That corporations can be sued as entities, and as persons under the various Civil Rights Acts is apparent from the case of Davis v. Jobs for Progress, Inc. 427 F. Supp. 479 (1976) stating as follows:

> "Corporation which operates manpower education program under subcontract with city of Phoenix with funds provided by United States Department of Labor and which hired certified teachers as instructors was an employer as that term is defined in Title VII of Civil Rights Act of 1964 and was person within meaning of relavent provisions of Titles VI and VII of the Civil Rights Act of 1964."

Therefore as persons under the above involved in a conspiracy to violate Kaufman's Civil Rights to Due Process under the 14th Amendments, and also with a public official, respondents should be held liable under such cases as Dennis v. Sparks, 449 U.S. 24,

(1980) Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922 (1982) and Briscoe v. Lahue, 103 S. Ct. 1108 (1983).

Aside from the part of the petitioners' state law suit, mainly concerning Boscov's Dept. Stores, Reading, Pennsylvania that was settled for $24,500, the major McCrory part was almost totally ruined by the respondents. Justice requires that they be held accountable.

CONCLUSION

For the foregoing reasons and in the public interest, a writ should issue.

Respectfully Submitted,

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